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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 415

DAVID A. GOLDNER,

Petitioner,

vs.

EDWARD S. SILVER,
District Attorney, Kings County, State of New York,
Respondent.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent's Brief in Opposition to Petition for Writ of Certiorari, in its counter-statement of facts, contains the following paragraph:

> "Regarding the hearing before the Special Referee, petitioner was represented by counsel, presented evidence, cross-examined witnesses, was given many months to prepare his case and was served with formal charges and particulars of the charges. *Not once during the hearing did petitioner object, complain, ask for an ajournment* (sic) *or raise the issue that the retention of his records was illegal or that he had been prevented from preparing his defense.* He never alleged

> that he was prevented from copying, using or working with his records. In the years that have passed subsequent to the return of the books and records, petitioner has not claimed or attempted to show in the Appellate Division. (sic) The Court of Appeals, this or any other Court that the records contained items which would have been helpful to him at the hearing before the Special Referee. Respondent's Brief, at page 3. (Emphasis supplied)

It is apparent that the quoted paragraph is meant to suggest (1) that petitioner has not properly preserved for review by this Court the issues raised in his petition for certiorari; and (2) that he has not demonstrated prejudicial error requiring reversal of the order of disbarment below; consequently, these charges are sufficiently grave, although unfounded, and the language employed by respondent sufficiently misleading to require reply. References to, and commentary upon, other matter in respondent's brief will follow in the order of appearance in the brief of the respondent.

I.

The indelible fact is that petitioner did all in his power at the earliest possible time to raise the issues of illegal search and seizure and due process of law now presented to this Court. The record is replete with judicial and extra-judicial pre-hearing attempts by the petitioner to have his records returned to him after they were confiscated by the Judicial Inquiry pursuant to subpoena *duces tecum* in November, 1957

(See P. 5-6; SR. 74-84; BO. 2*). The dilemma which compelled petitioner to respond to the subpoena of the Judicial Inquiry in the first instance has been outlined elsewhere (P. 18-19; and see SR. 136-137). And at the hearing itself, which, it must be noted, antedated by some six months this Court's ruling in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), that the exclusionary rule was a constitutional command upon the states, petitioner was precluded from moving to suppress the confiscated records or from otherwise objecting to their admission as evidence by the Special Referee's exposition of the law of evidence *as it then existed in New York* during the direct interrogation of the accountant called by the Assistant District Attorney:

> "Q. Will you explain to the Court how these books and records came into your possession?
>
> A. I think they came into my possession by subpoena.
>
> Special Referee: Tell me, does it make any difference how they got there?
>
> Mr. Markowitz [Assistant District Attorney]: I want to introduce them.
>
> Special Referee: If you have the books, introduce them. *In this State, even if they are illegally obtained, you can use them.*

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* The Petition for Writ of Certiorari is referred to throughout as "P" followed by a page reference. The Brief in Opposition to Petition for Writ of Certiorari is referred to as "BO" followed by a page reference. The transcript of the hearing before the Special Referee is referred to as "H" followed by a page reference. The Report of the Special Referee is referred to as "Report". The Supplemental Record is referred to as "SR"; Supplemental Record A is referred to as "SRA". Numerical references following "SR" and "SRA" are to folios unless otherwise indicated.

Mr. Gittleson [petitioner's counsel]: That is too bad, but it is a fact.

Special Referee: I am afraid I agree with you." (H. 211) (Emphasis supplied)

Moreover, the record denies the statement in respondent's brief that "petitioner has not claimed or attempted to show" any court "that the [confiscated] records contained items which would have been helpful to him at the hearing before the Special Referee" (BO. 3). For the record abundantly reflects not only the frustrations and difficulties under which petitioner and his counsel were required to function at the hearing, but the applications for relief addressed to the judiciary as well.

It must be borne in mind that, as the evidence developed, it became crucial to determine whether the proceeds of certain of petitioner's checks were actually received by the named payees and whether certain of petitioner's clients were charged sums in excess of the actual expenses in their cases. The ultimate resolution of these matters of fact against the petitioner by the Special Referee was a principle ingredient of the findings of subornation and perjury which resulted in petitioner's disbarment.

It is therefore evident that the confiscated checks and checkstubs, the ledgers and account books were vital to the defense, both as direct evidence and as a basis for intensive cross-examination of the accountant, whose testimony as an expert witness was the heart of the District Attorney's case. But the defense was denied the use of these records. Instead they were introduced piecemeal, eclectically, at the

sole whim and caprice of the district attorney, who was in a position rarely attained by an advocate,—a position in which he could sift the evidence *ex parte* and offer the documentary evidence which aided *his* theory of the case and, with impunity, suppress that which might aid his adversary.

A few examples will illustrate how completely the confiscation of petitioner's books and records handcuffed the defense at the hearing.

On direct examination of the accountant, through whom the confiscated documentary evidence was admitted and whose conclusions as an expert witness were largely responsible for the Special Referee's findings of fact relating to subornation and perjury:

"Q. Was there any explanation in the books as to what this $700 was for?

A. May I see that check, please? Is there any check stub? *I will have to bring his check stubs over.*

Q. *We have them in the office.*

A. *There is nothing on here that would say.*

Special Referee: You have nothing before you now in the absence of the check book itself which might possibly have a notation on the stub to give an explanation?

The Witness: *That is right, your Honor . . .*" (H. 220). (Emphasis supplied)

And on cross-examination of the same witness:

"Q. Our records indicate that on that date you said there was a check in Dascoli—for $100 to Dr. Marcus—and you have it for $25.00.

A. Is that check No. 6960?

Q. *I haven't got that, I am sorry. You have all our checks and I can't tell you that.*

A. *The only thing you can do . . . is mark this down and I'd have to check it. That's the only thing I can do. I haven't got it here. . . .*" (H. 274). (Emphasis supplied)

Petitioner's own testimony demonstrates dramatically the handicap under which the defense was laboring. For example, on direct examination:

"Q. What was the check in between? I notice one for $500, dated December 10, 1954, check #6782, and this one is dated December 13 for $3,000, #6784. What was the one in between?

A. *I don't know. I don't have my books.* But it could have been a check in reference to the case, something outstanding." (H. 460a). (Emphasis supplied)

And on cross-examination of the petitioner:

"Q. . . . I show you these two checks which are now marked respectively Petitioner's Exhibits 17 and 18 in the Zucker case, one for a thousand dollars and one for $2,983.50 and point out to you that they bear the numbers respectively 5206 and 5207 and are dated—one dated March 19 and the other dated March 19—and I ask you whether or not this check numbered 5204 made to the order of James A. Citroen in the sum of $700.00 dated March 12, 1954, is in connection with the Zucker case.

The Witness: Your Honor, I would like to see what check number 5205, which is missing, which might give me some idea of it——

Special Referee: Do you have those records here?

Mr. DiBlasi [Assistant district attorney]: In the meantime, Judge, maybe I can straighten it out with his own records, if I may be permitted to ask him a question.

Special Referee: All right. 5205—is this check for twenty dollars to Dr. Abraham Cohen?

The Witness: Yes. There's one thing else that would really help me. *They have my checkbook stubs. May I see that?*

Special Referee: Go ahead, Mr. DiBlasi.

Q. Is that the check?

A. Yes, but I question what case it is for . . . *This is taken from the checkbook stub. You know, those stubs that I turned in to you fellows, to the Judicial Inquiry . . . From that I could tell. Not from this.* This isn't the accountant's entry. . . ."

* * * *

"Q. Directing your attention to Petitioner's Exhibit 32, which is the check for $700.00, that was made to Citroen in payment for services rendered in connection with the Zucker case?

A. *I still tell you. I don't know without looking at the checkstub book.*" (H. 614-617) (Emphasis supplied)

Further, on cross-examination of the petitioner:

"Q. You wouldn't charge petty cash to a particular case in a ledger?

A. No, not that I know of.

Q. And you know that. You know that to be a fact?

A. I think so. As far as I know. *I'm not sure, but I haven't even looked at the books before I gave them and asked for them back. I haven't even looked at them. And now I haven't seen them in at least three years.*" (H. 602) (Emphasis supplied)

Further cross-examination:

"Special Referee: Didn't you say so?

The Witness: Yes. That the retainer was, as I recalled, signed in September. That's what I recall.

Q. You say a previous letter——

Mr. Gittleson: May I respectfully ask if our friend has the file. *They took it away. They have it somewhere. If they have it why don't we get to the retainer?*

Mr. DiBlasi: *I have no file . . .*

Special Referee: All right. Proceed." (H. 659) (Emphasis supplied)

Further:

"Special Referee: Mr. Goldner, do you have your files available for 1954, 1955 and 1956?

The Witness: Yes, I probably have almost all of them.

Special Referee: Do you have the subject books, the checkbooks?

The Witness: *No, they have those. I furnished those over to the Inquiry.*

Mr. DiBlasi: *We don't have them. He turned them over to the Inquiry but they never furnished them over to us.*

Special Referee: There is a sharp issue of fact here. This man's right to remain a member of the bar may very well be at stake . . ." (H. 731) (Emphasis supplied)

Finally, the following colloquy:

"Mr. Gittelson: So that the record is straight, we made demand for the production of the original check, but due to the confusion that existed they weren't produced. *I think they will concede that they had our checks.*

Special Referee: When you say you made demand, I assume you mean on the Judicial Inquiry?

Mr. Gittelson: No, we made the demand on Mr. DiBlasi.

Special Referee: All right is there anything else on cross?

Mr. DiBlasi: *My staff had looked for them, but weren't able to find any checks in this matter* . . ." (H. 780-781) (Emphasis supplied)

II.

Furthermore, petitioner's dilemma with regard to the seizure and unavailability of the confiscated records was presented after the hearing in timely and detailed fashion to both of the courts below: The Appellate Division (SR. 72-117) and The Court of Appeals of the State of New York (Brief of Respondent-Appellant, pp. 12-15; 24-26. Reply Brief of Respondent-Appellant, pp. 4-5), particularly and immediately after this Court announced its decision in *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

The prejudice to petitioner resulting from the illegal seizure and detention of his records has been amply demonstrated in each court below and in this Court. Since this Court has rejected the notion that state courts are the final arbiters of whether unconstitutional procedures have tainted a hearing or trial so as to require reversal, and instead, reviews state court proceedings to determine whether there is a *reasonable possibility* that the unconstitutional procedures *might have contributed* to the result, *Fahy* v. *Connecticut,* 375 U. S. 85 (1963), the record below clearly meets this broad test of reviewability and demonstrates the necessity for reversal here.

III.

The argument made by respondent at page 10 of its brief that the refusal of the New York courts to return petitioner's records to him after they were confiscated by subpoena, somehow converts an illegal search, seizure and detention of records into lawful conduct is more than "an exercise in semantics" (BO. 10). Respondent's contention misses the entire thrust of petitioner's argument; for if the search and seizure and detention of records were illegal in the first instance, as petitioner contends, no judicial imprimatur of a state court can convert such acts into lawful behavior; rather, the court orders denying petitioner's motions for relief are themselves in contravention of constitutional command, and consequently, nullities at best.

IV.

Respondent attaches great significance to the fact that "the only demand petitioner ever made . . . was for the physical return of these records. He never asked . . . that he be allowed to use, work with, or copy them" (BO. 11). So far as the contentions made by petitioner that the records were acquired by means of illegal search and seizure are concerned (P. 17-21), the respondent's argument is hopelessly irrelevant. If, as petitioner contends, the law enforcement authorities were not entitled to possession of the documents at all, it can hardly be seriously contended that they could in any manner retain the option to select for the petitioner the mode by which he might use his own records. Even so far as the charge of illegal detention of the records is concerned (P. 21-22), it is evident that the legal and extra-legal action taken by petitioner to secure the *broad* relief of return of the documents at least includes the *more narrow* relief of permitting access to them, upon the principle that the *greater* request includes the *lesser*. It cannot now be denied that a court to whom such application was made had the jurisdiction to fashion a more narrow remedy than was sought by petitioner, if it had wished to do so.

V.

At page 14 of its brief, respondent urges that *Malloy* v. *Hogan*, 378 U.S. 1 (1964) "is not really applicable" here because its facts are not identical to those in the case at bar. Once again the respondent has missed the point of the argument.

The holding in *Malloy* that the Fifth Amendment privilege against self-incrimination is a command upon the states by virtue of the Fourteenth is readily pertinent to the issues here raised. The Fourth and Fifth Amendments have long been inter-related in the history of criminal due process. Many of the search and seizure cases in the *federal* jurisdiction have turned upon interpretations of the commands of both the Fourth and Fifth Amendments, intermingled to be sure, but readily distinguishable. e.g., *Boyd* v. *United States,* 116 U.S. 616 (1886); *Gouled* v. *United States,* 255 U.S. 298 (1921). Even in *Mapp* v. *Ohio,* 367 U.S. 343 (1961), at least one member of this Court felt it necessary to combine the effect of the Fourth and Fifth Amendments before concurring in the application of the exclusionary rule to *state* action as a command of the Fourteenth Amendment. *Mapp* v. *Ohio,* 367 U.S. 643, 661-666 (1961) (concurring opinion).

Furthermore, the argument made by petitioner that the compulsory production of evidentiary matter constitutes an illegal seizure (P. 20-21), rests squarely upon the combined effect of the search and seizure provisions of the Fourth Amendment and the self-incrimination provisions of the Fifth. *Boyd* v. *United States, supra; Gouled* v. *United States, supra; United States* v. *Lefkowitz,* 285 U.S. 452 (1932).

It is readily apparent that in the instant case in which petitioner contends that both the Fourth and Fifth Amendments were violated by the State of New York, the decision in *Malloy* neatly complements the holding in *Mapp* to make symmetrically clear the

responsibility of the State of New York to comply with the commands of both Amendments.

One further compelling pertinency of *Malloy* to the case at bar. Respondent relies heavily upon this Court's decision in *Cohen* v. *Hurley*, 366 U.S. 117 (1961), upholding the right of the State of New York, as a rational scheme to rid the legal profession of undesirable practitioners, to abrogate the protections of criminal due process in disciplinary proceedings.

It may well be that, in view of the emerging federal standards of criminal due process, exemplified by *Mapp* and *Malloy*, the entire holding in *Cohen* v. *Hurley* has been undercut and should be re-examined. In any event, the case at bar is readily distinguishable from *Cohen* v. *Hurley*; for, in *Cohen* v. *Hurley*, no *federal* constitutional rights were violated by the State of New York, simply because the states were not *at that time* bound to enforce the privilege against self-incrimination contained in the Fifth Amendment and which was in issue in that case. (See discussion at P. 12 and f. n. 11). Consequently, *Cohen* v. *Hurley* stands for nothing more than the bare proposition that this Court will not interfere with a *state* scheme to discipline attorneys which abrogates, in some measure, *that state's* standards of due process of law. It leaves open, however, the question presented by this petition for writ of certiorari—whether such state action may violate minimal *federal* standards of due process, which, since *Mapp* and *Malloy*, require state compliance with the commands of the Fourth and Fifth Amendments.

Conclusion

For the foregoing reasons, as well as for the reasons set forth in his petition for writ of certiorari, petitioner renews his prayer that the petition for writ of certiorari be granted.

Rsepectfully submitted,

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